Supreme Court, U.S.
FILED
00 722 NOV 3 2000
No. _____
OFFICE OF THE CLERK

In The

Supreme Court of the United States

OCIE MILLS AND CAREY MILLS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

RONALD W. JOHNSON
KINSEY, TROXEL, JOHNSON, & WALBORSKY, P.A.
438 East Government Street
Pensacola, Florida 32501
P.O. Box 12686
Pensacola, Florida 32574
(850) 434-5267
Florida Bar No.: 166489

Attorney of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24PP

QUESTION PRESENTED

WHETHER THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THE SUPREME COURT IN *UNITED STATES V. MORGAN*?

PARTIES TO THE PROCEEDING

Petitioners are Ocie and Carey Mills. They were the Defendants in a criminal prosecution in the trial court and the Appellees in the Eleventh Circuit Court of Appeals.

Respondent is the United States of America, which was the Plaintiff/prosecution in the criminal case in the trial court and was the Appellant in the Eleventh Circuit Court of Appeals.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

TABLE OF APPENDICES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THE SUPREME COURT IN *UNITED STATES V. MORGAN* 4

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES:

Bivens v. Six Unknown Named Federal Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) 2

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).....4, 8

Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).....6, 7

Maddox v. United States, 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917 (1892) 8

Mills v. United States, 514 U.S. 1112, 115 S. Ct. 1966, 131 L. Ed. 2d 856 (1995) 3

Mills v. United States, 36 F.3d 1052 (11th Cir. 1994) ...2, 3

Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954) 8

Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)..... 7

Turner v. Louisiana, 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965).....6, 7

United States v. Mayer, 235 U.S. 55, 35 S. Ct. 16, 59 L. Ed. 129 (1914) 4, 5, 8, 9

United States v. Mills, 221 F.3d 1201 (11th Cir. 2000) ...1, 2

United States v. Mills, 904 F.2d 713 (11th Cir. 1990) 2

United States v. Mills, 817 F.Supp 1546 (N.D. Fla. 1993)..... 2

TABLE OF AUTHORITIES – Continued

Page(s)

United States v. Morgan, 346 U.S. 502, 74 S. Ct. 247, 98 L. Ed. 248 (1954) 4, 5, 6, 9

United States v. Swindall, 107 F.3d 831 (11th Cir. 1997) 4

STATUTES AND RULES:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(b) 3, 4

28 U.S.C. § 1651(a) 4

28 U.S.C. § 2255 ..... 2, 5

Clean Water Act, 33 U.S.C. § 1251 et seq. 2, 3

River and Harbors Act, 33 U.S.C. § 403 et seq 2

Fed. R. Crim. P. 33 (2000) 9

Fed. R. Crim. P. 33 (1988) 9

CONSTITUTION:

Sixth Amendment, United States Constitution 1, 4, 5, 9, 10

TABLE OF APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED AUGUST 8, 2000 .....App. 1

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA DATED AND FILED AUGUST 13, 1999 .....App. 11

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eleventh Circuit Opinion (Appendix A) is reported at *United States of America v. Mills*, 221 F.3d 1201 (11th Cir. 2000). The district court opinion (Appendix B) was entered on August 13, 1999.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on August 8, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution. The Sixth Amendment states in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a trial . . . by an impartial jury . . . "

STATEMENT OF THE CASE

In 1989, following a jury trial without assistance of counsel, the Millses, father and son, were convicted of discharging pollutants and unlawfully excavating a canal in the waters of the United States, in violation of the Clean Water Act, 33 U.S.C. § 1251 et seq., and the River and Harbors Act, 33 U.S.C. § 403 et seq., respectively. The unlawful conduct in question was the Millses' (1) placement of landfill on lots they had purchased knowing that the United States Army Corps of Engineers, having designated a portion of the land a wetland, required a permit for any further development, and (2) enlargement of an existing drainage ditch. See *United States v. Mills*, 221 F.3d 1201, 1202 (11th Cir. 2000), *Mills v. United States*, 36 F.3d 1052, 1054 (11th Cir. 1994) (per curiam), and *United States v. Mills*, 817 F. Supp. 1546-1548 (N.D. Fla. 1993).

Both were sentenced to twenty-one months' imprisonment, one year of supervised release, and a fine of $5,000. 817 F. Supp. at 1546. The convictions were summarily affirmed on direct appeal. See *United States v. Mills*, 904 F.2d 713 (11th Cir. 1990).

In 1990 Ocie Mills filed a *Bivens*[1] action challenging his arrest and prosecution. The district court dismissed the complaint. The Eleventh Circuit affirmed the dismissal.

In 1991, the district court denied the Millses' motion to vacate their sentences under 28 U.S.C. § 2255. See *United States v. Mills*, 817 F. Supp. 1546 (N.D. Fla. 1993).

---

[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

The District Court stated in its opinion that, at the time in question, the subject land was probably not a "wetland" for purposes of the Clean Water Act. *Id.* at 1548. That decision, too, was affirmed on appeal. See *Mills*, 36 F.3d 1052, 1057 (11th Cir. 1994). The United States Supreme Court denied certiorari. See *Mills v. United States*, 514 U.S. 1112, 115 S. Ct. 1966, 131 L. Ed. 2d 856 (1995). As of November 21, 1991, the Millses had completed their terms of imprisonment and supervised release.

On April 11, 1996, the Millses filed a petition for writ of error *coram nobis*. The basis for the petition was an attached affidavit from Quentin Wise, one of the jurors in the Millses' 1989 criminal trial. Wise contacted Ocie Mills after seeing Mills air his grievances against the government in a television program. Wise's affidavit stated that the foreman of the jury, Thomas J. Smith, had given the jury unfavorable information about the Millses that had not been introduced into evidence at trial. According to the affidavit, the source of Smith's extrinsic information was Smith's son, who allegedly had worked for the "State of Florida Water Management" and was familiar with the Millses and their previous misconduct and problems with the government. Wise's affidavit also stated that Wise felt intimidated by jury foreman Smith.

The district court declined to adopt the report and recommendation and instead concluded that the Millses had stated a cognizable basis for relief. It remanded the matter to the magistrate judge for an evidentiary hearing on the substance of the Millses' allegations of jury misconduct. The district court denied the government's motion for reconsideration, but granted its motion under 28 U.S.C. § 1292(b) to certify the matter for interlocutory

appeal. By order dated December 3, 1999, the court of appeals granted the government permission to appeal under § 1292(b).

On August 8, 2000, the Court of Appeals reversed the decision of the trial court and remanded for entry of judgement for the government. Relying upon this Court's decision in *United States v. Mayer*, 235 U.S. 55, 35 S. Ct. 16, 59 L. Ed. 129 (1914), the Eleventh Circuit held that allegations of jury impartiality are not cognizable on *coram nobis* as error of the most fundamental character. (App. 8).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THE SUPREME COURT IN *UNITED STATES V. MORGAN.*

The Sixth Amendment to the United States Constitution expressly guarantees every accused person the right in a criminal prosecution to have the right to a trial by an impartial jury. This Court has characterized this right as one of the few most fundamental interests guaranteed by the Constitution. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075, 111 S. Ct. 2720, 2745, 115 L. Ed. 2d 888 (1991).

In 1954, the Supreme Court's decision in *United States v. Morgan*, 346 U.S. 502, 74 S. Ct. 247, 98 L. Ed. 248 (1954), revived the ancient writ of *coram nobis* by holding that the writ was available in federal courts pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *Morgan*, 346 U.S. at 506, fn.6, 511, 74 S. Ct. at 250, fn.6, 252; see *United States v.*

Swindall, 107 F.3d 831, 834 (11th Cir. 1997). The Supreme Court specifically stated that the enactment of 28 U.S.C. § 2255 is not a bar to *coram nobis*, and a district court has the power to grant *coram nobis*. *Morgan*, 346 U.S. at 511, 74 S. Ct. at 252. The Supreme Court held in *Morgan*:

> Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice.

Id.

The Supreme Court also held:

> [when] no other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the nature of the extraordinary writ of *coram nobis* must be heard by the federal trial court. (footnote omitted) Otherwise a wrong may stand uncorrected which the available remedy would right.

Morgan, 346 U.S. at 512, 74 S. Ct. at 253. *Morgan* also noted that in *United States v. Mayer*, 235 U.S. 55, 35 S. Ct. 16, 59 L. Ed. 129 (1914) the Supreme Court stated that *coram nobis* included errors "of the most fundamental character." *Id.*

In *Morgan*, the defendant pled guilty in 1939 and filed his petition for writ of *coram nobis* sometime after 1950, alleging a violation of his Sixth Amendment constitutional right through failure, without his competent waiver, to furnish him counsel. 346 U.S. at 503-04, 74 S. Ct. at 248-49. In 1954, the United States Supreme Court held that although Morgan had served his prison term,

the power to remedy an invalid sentence exists, and Morgan was entitled to an opportunity to attempt to show that the conviction was invalid. *Morgan*, 346 U.S. at 512-13, 74 S. Ct. at 253.

Ocie and Carey Mills have met all the requirements of *United States v. Morgan*. They have been deprived of their Sixth Amendment constitutional right to a trial by an impartial jury. The Millses have no other remedy available and sound reasons exist for failure to seek appropriate earlier relief. Within approximately one month of receiving information about the misconduct of the jury, the Millses filed their petition for writ of error *coram nobis* in the trial court. (App. 16). The extraordinary writ of *coram nobis* must be heard by the district court or otherwise a wrong will stand uncorrected which the available remedy would right.

> England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English.

Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961). "The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S. Ct. 546, 549, 13 L. Ed. 2d 424 (1965).

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of

> impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682; *Tumey v. State of Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworn.' Co.Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v. City of Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416. . . .

Irvin v. Dowd, 366 U.S. at 722, 81 S. Ct. at 1642.

In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that all the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. *Turner v. Louisiana*, 379 U.S. at 472-73, 85 S. Ct. at 550. The right to a trial by jury in serious criminal cases is "fundamental" to the American scheme of justice, and includes as its most important element the right to a trial by an impartial jury. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S. Ct. 2078, 2080, 124 L. Ed. 2d 182 (1993).

In a criminal case, any private communication, contact, or tampering directly or indirectly with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. *Maddox v. United States*, 146 U.S. 140, 148-50, 13 S. Ct. 50, 52-53, 36 L. Ed. 917 (1892), *Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 451, 98 L. Ed. 654 (1954).

In the *instant* case, the Eleventh Circuit Court of Appeals held:

> We understand why the district court might consider juror misconduct to be an error of the most fundamental character. Were we writing on a clean slate, we might agree because, as a theoretical proposition, this argument is not without persuasiveness. After all, the Sixth Amendment expressly guarantees the right to trial by an impartial jury, and the United States Supreme Court has characterized this right as one of the few most fundamental interests guaranteed by the Constitution." See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).
>
> Nevertheless, the argument that allegations of jury impartiality should be cognizable on *coram nobis* as error of the most fundamental character may be compelling, but it is not the law. See *Mayer*, 235 U.S. at 69, 35 S. Ct. 16.

> [The Supreme Court has told us] more than once . . . that, "[i]f precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court, the prerogative of overruling its own decisions." (Citations omitted).

(App. 8-9). The decision of *United States v. Mayer, supra,* and the Eleventh Circuit's decision in the *instant* case, conflicts with this Court's decision in *United States v. Morgan, supra.*

Relying upon *United States v. Mayer, supra,* the Eleventh Circuit held that claims of misbehavior or partiality of jurors must be raised by a motion for new trial, as newly discovered evidence. (App. 4, 9-10). In 1989 when the Millses were convicted and in 1996 when they filed their petition for writ of error *coram nobis,* there was a two year statute of limitations to file a motion for new trial alleging newly discovered evidence pursuant to Rule 33, Fed. R. Crim. P. (1988). Rule 33 was amended in 1998 and now provides for a three year statute of limitations to file a motion for new trial alleging newly discovered evidence.

United States v. Morgan, supra, did not place a statute of limitations upon Constitutional error which was not previously known to a person unjustly convicted of a crime. Petitioners have suffered an error of the most fundamental character. Ocie and Carey Mills' Sixth Amendment right to an impartial jury trial is no less important than Morgan's Sixth Amendment right to

counsel. Morgan was allowed by this Court to raise his *coram nobis* claim more than eleven years after his Sixth Amendment violation. The conflict is clear and irreconcilable. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

RONALD W. JOHNSON
KINSEY, TROXEL, JOHNSON,
& WALBORSKY, P.A.
438 East Government Street
Pensacola, Florida 32501
(850) 434-5267
Florida Bar No.: 166489

Attorney of Record for Petitioners

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14934

D.C. Docket No. 88-03100-CR-RV

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

OCIE MILLS, CAREY MILLS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(Filed August 8, 2000)

Before CARNES, MARCUS and FARRIS*, Circuit Judges.

FARRIS, Circuit Judge:

We decide whether the defendants-appellees, Ocie Mills and Carey Mills, may seek extraordinary relief by way of a writ of coram nobis based on their allegation that jurors in their criminal trial considered extrinsic

---

* Honorable Jerome Farris, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

evidence. We reverse and remand for entry of judgment for the government.

The material facts are undisputed. In 1989, following a jury trial, the Millses, father and son, were convicted of discharging pollutants and unlawfully excavating a canal in the waters of the United States, in violation of the Clean Water Act, 33 U.S.C. § 1251 et seq., and the Rivers and Harbors Act, 33 U.S.C. § 403 et seq., respectively. The unlawful conduct in question was the Millses' (1) placement of red clay landfill on lots they had purchased knowing that the United States Army Corps of Engineers, having designated a portion of the land a wetland, required a permit for any further development, and (2) enlargement of an existing drainage ditch. *See Mills v. United States*, 36 F.3d 1052, 1054 (11th Cir. 1994) (per curiam).

Both were sentenced to twenty-one months' imprisonment, one year of supervised release, and a fine of $5,000. The convictions were summarily affirmed on direct appeal. *See United States v. Mills*, 904 F.2d 713 (11th Cir. 1990).

In 1990, Ocie Mills filed a *Bivens*[1] action challenging his arrest and prosecution. The district court dismissed the complaint. The Eleventh Circuit affirmed the dismissal.

In 1991, the district court denied the Millses' motion to vacate their sentences under 28 U.S.C. § 2255. *See United States v. Mills*, 817 F. Supp. 1546 (N.D. Fla. 1993).

---

[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

That decision, too, was affirmed on appeal. *See Mills*, 36 F.3d 1052, 1057 (11th Cir. 1994). The United States Supreme Court denied certiorari. *See United States v. Mills*, 514 U.S. 1112 (1995).

As of November 21, 1991, the Millses had completed their terms of imprisonment and supervised release.

On April 11, 1996, the Millses filed a petition for writ of error coram nobis. The basis for the petition was an attached affidavit from Quentin Wise, one of the jurors in the Millses' 1989 criminal trial. Wise contacted Ocie Mills after seeing Mills air his grievances against the government in a television program. Wise's affidavit stated that the foreman of the jury, Thomas J. Smith, had given the jury unfavorable information about the Millses that had not been introduced into evidence at trial. According to the affidavit, the source of Smith's extrinsic information was Smith's son, who allegedly had worked for the "State of Florida Water Management" and was familiar with the Millses and their previous misconduct and problems with the government. Wise's affidavit also stated that Wise felt intimidated by jury foreman Smith.

The district court declined to adopt the report and recommendation and instead concluded that the Millses had stated a cognizable basis for relief. It remanded the matter to the magistrate judge for an evidentiary hearing on the substance of the Millses' allegations of jury misconduct. The district court denied the government's motion for reconsideration, but granted its motion under 28 U.S.C. § 1292(b) to certify this matter for interlocutory appeal. By order dated December 3, 1999, we granted the government permission to appeal under § 1292(b).

THE PARTIES' CONTENTIONS

A. The Government's Position

Relying primarily on United States Supreme Court authority, the government contends that the basis for the Millses' coram nobis petition – newly discovered evidence that the jury considered extrinsic evidence and therefore was not impartial – is unavailable to remedy alleged "prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence." *See United States v. Mayer*, 235 U.S. 55, 69 (1914); *United States v. Morgan*, 346 U.S. 502, 512 (1954). The government points out that the writ of coram nobis is available only to remedy errors "of the most fundamental character," *see Mayer*, 235 U.S. at 69, and argues that expanding the availability of coram nobis relief by permitting the Millses to proceed would undermine the finality of criminal convictions and the sanctity of jury deliberations.

B. The Millses' Position

The Millses contend that the government has misread *Mayer*, which, in their view, does not foreclose pursuit of coram nobis relief on the basis they have asserted. In the Millses' view, coram nobis relief is available where, as here, it is necessary to achieve justice when no other remedy is available and sound reasons exist for failure to seek earlier relief.

DISCUSSION

The issue is purely a question of law, which we review de novo. *See United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000).

Federal courts have authority to issue a writ of error coram nobis under the All Writs Act, 28 U.S.C. § 1651(a). The writ of error coram nobis is an extraordinary remedy of last resort available only in compelling circumstances where necessary to achieve justice. *See United States v. Swindall*, 107 F.3d 831, 834 (11th Cir. 1997). A court's jurisdiction over coram nobis petitions is limited to the review of errors "of the most fundamental character." *Mayer*, 235 U.S. at 69.[2] Such errors do not include "prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence." *Id.* In addition, courts may consider coram nobis petitions only where no other remedy is available and the petitioner presents sound reasons for failing to seek relief earlier. *See Morgan*, 346 U.S. at 512.[3]

The Millses have challenged the applicability of the holding in *Mayer* to this case. The defendant in *Mayer*, Albert Freeman, was convicted in federal district court of

---

[2] The writ of coram nobis has been abolished in civil cases. *See* Fed. R. Civ. P. 60(b).

[3] When *Mayer* was decided, district courts held formal terms of operation lasting for a specified period. *See* 28 U.S.C.A. § 138 (West 1993) (in particular Historical and Statutory Notes, 1948 Acts). A district court could entertain a motion for new trial only if it was filed during the same term of court in which the judgment was entered. *See Mayer*, 235 U.S. at 67-69; Fed. R. Civ. P. 77 advisory committee's note.

misuse of the mails. *See Mayer*, 235 U.S. at 56. He appealed his conviction. *See id.* Ten months later, after the expiration of the term of court during which Freeman's judgment of conviction was entered, Freeman filed a motion in district court to set aside his conviction or for a new trial.[4] One of the grounds for the motion was Freeman's allegation that, during voir dire, one juror concealed a bias against Freeman. *See id.* at 57. Despite, (1) the expiration of the term of court during which Freeman was convicted, and (2) Freeman's pending appeal of his conviction, the government purported to consent to the district court's jurisdiction over the new trial motion. District Court Judge Mayer granted the motion. The government obtained an order from the court of appeals directing Judge Mayer to show cause why a writ of prohibition should not issue forbidding the granting of a new trial.

The Supreme Court held that the district court was without jurisdiction to entertain Freeman's new trial motion for two independent reasons: (1) the term during which Freeman's conviction issued had expired, and the facts did not warrant recognizing any exceptions to this jurisdictional bar, *see id.* at 67-69, and (2) once Freeman appealed his conviction in the court of appeals, the district court was deprived of jurisdiction over his case despite the government's purported consent, *see id.* at 71.

The Court explained that where errors of the most fundamental character existed, a district court might have

---

[4] The government recognizes that no other remedy is available to the Millses and that they have presented sound reasons for failing to seek relief earlier.

"correctional jurisdiction" like that available at common law under coram nobis. *Id.* at 69. The Court, however, explicitly refused to decide whether the writ of coram nobis remained an available remedy in the federal courts, and further stated that, even if it was, such relief would be unavailable to Freeman. *See id.* at 69. The Court ultimately held that the proper remedy "[i]n cases of prejudicial misconduct in the course of trial, the misbehavior or partiality of jurors, and newly discovered evidence" is "by a motion for a new trial." *Id.*

Subsequent controlling opinions have confirmed the applicability in federal courts of the writ of coram nobis and, moreover, have treated *Mayer* as the source of the applicable rule governing the circumstances under which coram nobis relief is available. Specifically, the Court in *United States v. Morgan*, 346 U.S. 502, 512-13 (1954), citing *Mayer*, held that criminal defendants could pursue coram nobis relief to remedy errors "of the most fundamental character." *Morgan*, 346 U.S. at 512 (citation omitted).[5]

Post-*Morgan* decisions by the Supreme Court, the Fifth Circuit, and the Eleventh Circuit have treated Mayer as the source of the controlling rule on the availability of coram nobis relief. *See Carlisle v. United States*, 517 U.S. 416, 428-29 (1996) (citing *Mayer* for the applicable standard governing coram nobis petitions, and stating that it is difficult to conceive of a situation in a federal criminal

---

[5] The circumstances in *Morgan* warranting the defendant's pursuit of coram nobis relief were his allegations that, without his competent waiver, the district court had failed to appoint him counsel. *See id.* at 504.

case today in which coram nobis relief would be necessary or appropriate); *United States v. Addonizio*, 442 U.S. 178, 186 (1979) (citing *Mayer* for the proposition that coram nobis relief is limited to errors of the most fundamental character); *Lowery v. United States*, 956 F.2d 227, 230 (11th Cir. 1992) (per curiam) (treating *Mayer* standard as controlling); *Moody v. United States*, 874 F.2d 1575, 1577 (11th Cir. 1989) (treating *Mayer* standard as controlling, and affirming denial of coram nobis petition based on allegations of newly discovered evidence); *Granville v. United States*, 613 F.2d 125, 126 n.1 (5th Cir. 1980) (per curiam) (treating *Mayer* standard as controlling); *United States v. Carter*, 437 F.2d 444, 445 (5th Cir. 1971) (same).

We understand why the district court might consider juror misconduct to be an error of the most fundamental character. Were we writing on a clean slate, we might agree because, as a theoretical proposition, this argument is not without persuasiveness. After all, the Sixth Amendment expressly guarantees the right to trial by an impartial jury, and the United States Supreme Court has characterized this right as one of the few most fundamental interests guaranteed by the Constitution. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991).

Nevertheless, the argument that allegations of jury impartiality should be cognizable on coram nobis as error of the most fundamental character may be compelling, but it is not the law. *See Mayer*, 235 U.S. at 69.

> [The Supreme Court has told us] more than once . . . that, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the

> case which directly controls, leaving to this Court, the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989); accord, *e.g., Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 2017, 138 L.Ed.2d 391 (1997) ("We do not acknowledge and we do not hold that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."). We have followed that admonition. *See Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519, 525 (11th Cir. 1997) ("It may be that the Supreme Court has cut *Alexander* [*v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974)] back so far that it will not survive. Perhaps, but we are not convinced we are authorized to sing the dirge of Alexander. We will leave that to the Supreme Court, which has admonished courts of appeals . . . '[to leave it] the prerogative of overruling its own decisions.' ") (quoting *Rodriguez de Quijas*, 490 U.S. at 484, 109 S.Ct. at 1921-22); *Engineering Contractors Ass'n v. Metropolitan Dade County*, 122 F.3d 895, 903 (11th Cir. 1997).

Jefferson County v. Acker, 210 F.3d 1317, 1319 (11th Cir. 2000).

Relying on *Mayer*, we have held that allegations of newly discovered evidence are not cognizable in a petition for coram nobis. *See Moody*, 874 F.2d at 1577 (holding that coram nobis is improper vehicle for claims of newly discovered evidence, and observing that coram nobis petitions are similar to motions for new trial).

We therefore reject the Millses' argument that the government's reading of *Mayer* is incorrect. In the Millses' view, *Mayer* simply decided that Freeman could not seek relief in district court because he had another remedy available to him, i.e., pursuit of the appeal of his conviction.

The Millses, however, are mistaken. The Court's two grounds for concluding that the district court lacked jurisdiction in *Mayer* were independent, each alone sufficient to dispose of the case. The Supreme Court's holding in *Mayer* that Freeman's appeal of his conviction deprived the district court of jurisdiction did not affect its separate holding that Freeman had failed to allege error of a fundamental character such as would have warranted pursuit of coram nobis relief at common law.

We reverse and remand for entry of judgment for the government.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES
OF AMERICA,

v.

CASE NO. 88-03100/RV

OCIE MILLS and
CAREY C. MILLS,

Defendants.
_____/

ORDER

This matter is before me now for consideration of the Magistrate Judge's Report and Recommendation dated March 17, 1999. The defendants have been furnished a copy of the Report and Recommendation and have been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1). I have made a *de novo* determination of those portions to which an objection has been made.

The petition under consideration is the petition for writ of error *coram nobis* filed by the defendants. The defendants were originally convicted by jury trial in 1989 of five counts of discharging pollutants into the waters of the United States without a permit, in violation of the Clean Water Act 33 U.S.C. § 1251 *et seq.*], and one count of unlawfully excavating a canal in the navigable waters of the United States, in violation of the Rivers and Harbors Act [33 U.S.C. § 403 *et seq.*]. The were each sentenced by the late Senior Judge Winston E. Arnow to a term of

twenty-one months imprisonment, followed by one year of supervised release, and a fine of $5,000. The defendants' convictions were affirmed upon direct appeal in *United States v. Mills*, 904 F.2d 713 (11th Cir. 1990) (table). The defendants filed a motion to vacate sentence pursuant to Title 28, United States Code, Section 2255. Although I determined that their offenses of conviction were based upon seriously flawed legal principles, I was forced to conclude that any change in the law had to be made by Congress and not by the Courts. Therefore, I denied their motion on March 31, 1993. *United States v. Mills*, 817 F. Supp. 1546 (N.D. Fla. 1993). That decision was subsequently affirmed by the Eleventh Circuit Court of Appeals in *United States v. Mills*, 36 F.3d 1052 (11th Cir. 1994). The Supreme Court of the United States also denied certiorari. *Cert. denied*, 514 U.S. 1112, 115 S.Ct. 1966, 131 L.Ed.2d 856 (1995).

In their current petition for writ of error *coram nobis*, the defendants contend that they are entitled to a new trial because of juror misconduct. Attached as an exhibit to the petition is the affidavit of Quentin Wise, a member of the jury that convicted the defendants. Wise states in his affidavit that Mr. Smith, the foreman of the jury, repeatedly told Wise that defendant Ocie Mills had prior cases, that the defendant had threatened environmental people on his property with a gun, and that if the defendant was found guilty, he would not be sentenced to a prison term and would only have to remove soil from the property. (doc. 185, att.) Wise also states that Mr. Smith told Wise that "he was familiar with Ocie Mills' prior problems and wrong doings because his son was employed with the State of Florida Water Management."

Id. The defendants indicate that Quentin Wise contacted the defendants after watching a television program featuring defendant Ocie Mills on March 3, 1996.

According to the government, the defendants have not stated a claim for which relief can be granted pursuant to a writ of error *coram nobis*. Under the Rules of Criminal Procedure, a motion for new trial on newly discovered evidence must be filed within three years after the verdict or finding of guilt. Rule 33, Fed. R. Crim. P. The government contends that the issue of juror misconduct should have been raised in a timely motion for new trial, and cannot be raised in a petition for writ of error coram nobis. The government concludes that because a motion for new trial based upon newly discovered evidence is untimely, the petition must be denied. The Magistrate Judge agreed, and recommended denial of the petition. (doc. 194)

Federal courts have authority to issue a writ of error *coram nobis* under the All Writs Act [28 U.S.C. § 1651(a)]. The writ is a limited remedy of last resort, and is limited to cases in which "no statutory remedy is available or adequate." *Lowery v. United States*, 956 F.2d 227, 228-29 (11th Cir.1992) (citations omitted). "Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." *United States v. Morgan*, 346 U.S. 502, 511, 74 S. Ct. 247, 252, 98 L. Ed. 248 (1954). "Such compelling circumstances exist only when the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular

and invalid." *Moody v. United States*, 874 F.2d 1575, 1576 (11th Cir. 1989) (citing *United States v. Mayer*, 236 U.S. 55, 69, 35 S. Ct. 16, 19-20, 59 L. Ed. 129 (1914)).

The government relies primarily upon *Moody v. United States*, 874 F.2d 1575 (11th Cir. 1989). In *Moody*, the petitioner sought relief from a conviction on the ground of newly discovered evidence that allegedly proved that he did not commit the crime. The district court dismissed the petitioner's petition for writ of error *coram nobis*. On appeal, the Eleventh Circuit defined the issue as whether the petitioner's allegation of newly discovered evidence was the "fundamental type of irregularity" for which the writ provided a remedy. *Id.* at 1577. The Eleventh Circuit held that "[a] claim of newly discovered evidence relevant only to the guilt or innocence of the petitioner is not cognizable in a *coram nobis* proceeding." *Id.* According to the Eleventh Circuit, "[t]he rule that new evidence is not a claim for which the writ . . . may be issued is consistent with the limitation imposed on movants seeking a new trial based upon newly discovered evidence." *Id. See Reid v. United States*, 149 F.2d 334 (5th Cir. 1945) (petitioner was denied relief because coram nobis petition was, in substance, merely an untimely motion for a new trial based on newly discovered evidence).

In this case, the defendants allege that juror misconduct occurred when the foreman of the jury obtained information about the defendants from outside the courtroom and communicated such information to other jurors during the trial. This is newly discovered evidence, but the time for a new trial on that ground has long expired and there is no statutory remedy now available. Thus, the defendants' only possible source of relief is via a writ of

error *coram nobis*. The issue presented is whether the substantive allegation supporting the defendants' present challenge to their convictions involve a "fundamental" constitutional principle.

Among the most fundamental protections available to an accused is the right to trial by an impartial jury guaranteed by the Sixth Amendment. *Ristaino v. Ross*, 424 U.S. 589, 595 n.6, 96 S. Ct. 1017, 1020 n.6, 47 L. Ed. 2d 258 (1976); *Singer v. United States*, 380 U.S. 24, 36, 85 S. Ct. 783, 790, 13 L. Ed. 2d 630, 638 (1965). The requirement that the jury verdict be based on the evidence produced at trial "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. State of Louisiana*, 379 U.S. 466, 472, 86 S. Ct. 546, 549, 13 L. Ed. 2d 424 (1965). "Extrinsic evidence, evidence that has not been subject to the procedural safeguards of a fair trial, threatens such constitutional safeguards as the defendant's right of confrontation, of cross-examination, and of counsel." *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984). When jurors consider extrinsic evidence, a new trial is required if the evidence "poses a reasonable possibility of prejudice to the defendant." *United States v. Rowe*, 906 F.2d 654, 656 (11th Cir. 1990). Although the defendant has the burden of demonstrating prejudice, the court must investigate an alleged impropriety "upon merely a colorable showing of extrinsic influence." *Id.*

The defendants' allegation of juror misconduct is not merely a "claim of newly discovered evidence relevant only to the guilt or innocence of the petitioner." *Moody*, 874 F.2d at 1577. Instead, the defendants have alleged a constitutional violation that affects the validity of the

underlying proceeding. The defendants have alleged a fundamental constitutional error, as did the defendant in *United States v. Morgan, supra,* who alleged that he was not advised of his constitutional rights and did not competently or intelligently waive counsel prior to entering his plea of guilty. Upon consideration of the *Morgan* petition, the Supreme Court of the United States held:

> Where it cannot be deduced from the record whether counsel was properly waived, we think, no other remedy being then available and sound reasons existing for failure to seek appropriate other relief, this motion in the nature of the extraordinary writ of coram nobis must be heard by the federal trial court.

United States v. Morgan, supra, 346 U.S. at 511-12, 74 S. Ct. at 252-53.

In this case, the defendants did not become aware of the alleged juror misconduct until well after the time limits had expired on all normally available avenues of relief. The defendants filed the present petition approximately a month after learning of the alleged misconduct. Because the defendants have alleged facts that would support a claim of constitutional error – a fundamental error that could potentially render the underlying proceeding invalid – the defendants are entitled to an evidentiary hearing and an opportunity to present evidence supporting their petition. *See, e.g., Lujan v. United States,* 424 F.2d 1053 (5th Cir. 1970); *United States v. Carlino,* 400 F.2d 56 (2d Cir. 1968).

Having considered the report and recommendation and all objections thereto timely filed by the parties, I have determined that the report and recommendation

should not be adopted. Instead, the matter is remanded to the Magistrate Judge for an evidentiary hearing on the petition for writ of error *coram nobis*.

DONE AND ORDERED this 13th day of August, 1999.

/s/ Roger Vinson
ROGER VINSON
Chief Judge